Supreme Court, U.S.
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No. 02-1173

IN THE

# Supreme Court of the United States

METROPOLITAN TRANSPORTATION AUTHORITY,

*Petitioner,*

*v.*

SEAN GREENE,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

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## REASONS FOR DENYING THE WRIT

The Metropolitan Transportation Authorities (hereinafter referred to as "MTA") Petition for Writ of Certiorari is replete with hyperbole and misstatements of law and fact in an attempt to create the impression that a conflict exists among the circuits. "MTA" claims that the Second Circuit Court of Appeals has "misused" the current law and now "stands alone" with its "expansive view of FELA" which opens the proverbial "courthouse door" to a flood of new Federal Employers' Liability Act (hereinafter referred to as "FELA") cases.

None of this is true. There is no conflict among the Circuits. The law applied by the Second Circuit is not "misused", but rather long standing and time tested. The Court is not expanding FELA, it has restored "FELA" to workers who had been covered by the statute for nearly 100 years. Additionally, in spite of overwhelming evidence to the contrary, MTA also seeks to cloak itself with sovereign immunity which this Court and the Third Circuit has previously denied to New York City's two other commuter railroads, Port Authority Trans Hudson, *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994) and New Jersey Transit, *Fitchik v. New Jersey Transit Rail Operation*, 873 F.2d 655 (3d Cir. 1989) (en banc).

There are only two questions presented:

Whether the MTA is a common carrier operating a railroad in interstate commerce;

And, whether the MTA is the alter-ego of the State of New York entitled to Eleventh Amendment Sovereign Immunity.

The Second Circuit Court of Appeals unanimously and correctly decided both issues against the petitioner. Both issues are so strongly supported by evidence in the record that review by this Court is unwarranted.

## I.

## THE SECOND CIRCUIT COURT OF APPEALS DID NOT "MISUSE" OR APPLY THE WRONG LAW IN DETERMINING THAT THE MTA OPERATES A RAILROAD WITHIN THE COVERAGE OF FELA

Contrary to the MTA's assertions in its Petition, the Second Circuit does not "stand alone" in its application of the law in determining if an entity is a common carrier operating a railroad in the meaning of FELA. This Court has addressed the issue and defined a common carrier by a number of four times in the last century. *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 31 S. Ct. 279, 55 L. Ed. 310 (1911); *United States Union Stock Yard and Transit Co.*, 226 U.S. 286, 33 S. Ct. 83 57 L. Ed. 226 (1912); *United States v. Brooklyn Eastern District Terminal*, 249 U.S. 296, 39 S. Ct. 283, 63 L. Ed. 613 (1919); *United States v. State of California*, 297 U.S. 175, 56 S. Ct. 421, 80 L. Ed. 567 (1936).

In 1967, the Fifth Circuit Court of Appeals in *Lone Star Steel Co. v. McGee*, 380 F.2d 640, *cert denied*, 389 U.S. 977, 88 S. Ct. 480, 19 L. Ed. 471 (1967) synthesized these cases and developed a four prong test to determine whether an entity is a common carrier operating a railroad within the meaning of FELA. That test has been universally accepted and uniformly applied. The Second Circuit below correctly analyzed the MTA using the Lone Star criteria and

unanimously agreed with the District Court that the MTA clearly is a common carrier operating a railroad in interstate commerce.

MTA grossly misstates the facts when it declares that the Second Circuit "for the first time in a century of FELA Juris Prudence held that a parent may be liable under FELA because it exerts *some* control over a separately incorporated, operating railroad". (Emphasis Added) (Pet. at 19) Nothing can be further from the truth. The record clearly demonstrates and the Court correctly found that MTA was integrally involved in the essential business aspects of the Long Island Railroad's operation.

The uncontested evidence is that the MTA provides the Long Island Railroad's with the following services:

Advertising;

Marketing;

Budgeting;

Cash management;

Legal services;

Real estate management;

Equipment purchases;

Raises fares and funds;

Issues and services debt;

Negotiates Collective Bargaining Agreements with the Long Island Railroad's unions;

Appoints the Long Island Railroad's President;

Serves as the Long Island Railroad's Board of Directors;

Finances all capital improvements to the Long Island Railroad infrastructure, including stations, trackage and repair facilities;

And, finally provides all of the Long Island Railroad's security personnel through the MTA Police of which plaintiff is a member.

The Long Island Railroad does not exist without "MTA". The District Court, in its Opinion, quoted the MTA: "without the MTA, the two state, 14 county, 4,000 square mile territory it serves would grind to a halt".

The record has such an abundance of evidence that the MTA, the self-proclaimed "largest provider of public transportation in the western hemisphere" is not merely a parent holding company but rather "directly and integrally involved in the essential business aspects of the Long Island Railroad" and therefore a common carrier operating a railroad within the meaning of the FELA.

Indeed, after publicly announcing in November, 2002 a merger of the Long Island Railroad and Metro-North Commuter Railroad to form the new "MTA Railroad", it is utterly ludicrous to argue that the MTA is not a railroad, yet in its petition MTA declares "no one questions that the MTA is not a railroad". (Pet. at 15)

None of the cases cited by the MTA support their contention that there is a conflict among the Circuits. *Iverson v. Southern Minn. Beet Sugar Co-Op*, 62 F.3d 259 (8th Cir. 1995) and *Sullivan v. Scoular Grain Company of Utah*, 930 F.2d 798 (10th Cir. 1991) used the same *Lone Star* test as the Second Circuit here. *Felton v. Southeastern – P.A. Transp. Auth.*, 952 F.2d 59 (3d Cir. 1992) involved an attempt to expand FELA coverage to inter city transit workers who had never been covered by FELA as opposed to the case at bar. Where the plaintiff seeks to thwart the MTA's attempt to remove FELA rights from a group of workers previously covered for nearly 100 years.

MTA's "pierce the corporate veil" argument is irrelevant and not addressed by either the District Court or the Second Circuit Court of Appeals. Nor do any of the decisions of other Federal Agency's, like Railroad Retirement Board, carry weight sufficient to change the outcome or cause this Court to grant cert. The fact that FELA claims can arise out of "local auto accidents" is not federalizing "a run-of-the-mill auto accident tort claim". It has never been the nature of the cause of action but rather the work in furtherance of interstate commerce by rail that governs FELA. Equally irrelevant is the fact that MTA gave what it calls "Workers' Compensation" to Sean Greene. Regardless of the name, Police Officer Greene was entitled to the same full medical and full pay while out injured under his Collective Bargaining Agreement with the Long Island Railroad.

Finally, the MTA's attempt to grab the Court's attention with the sky is falling argument that "the Second Circuit's Decision flashed a green light inviting FELA suits against regional transportation agencies nation wide" together with its campaign to solicit Amicus Briefs from its fellow

commuter railroads around the country is pointless. Neither the FELA nor the common law definition of a common carrier set forth by this Court and synthesized by the Sixth Circuit in Lone Star has changed. As the District Court noted Police Officer Sean Greene was no less employed by a common carrier today with the MTA than he was when he performed the same duties when employed by the Long Island Railroad. Regional commuter railroads are capable of organizing themselves in such a way as to isolate workers covered by FELA from those employees engaged in purely intra-state transit operations.

## II.

## THE SECOND CIRCUIT COURT OF APPEALS CORRECTLY FOUND "MTA" DOES NOT QUALIFY FOR ELEVENTH AMENDMENT SOVEREIGN IMMUNITY

Although jurisdiction can be raised at any time during the pendency of a case, MTA's motion was raised as an after thought following the Second Circuit's Decision denying its appeal of the common carrier issue and for a very good reason it did not merit a written opinion by the Court. MTA is so clearly and completely autonomous from the State of New York that it doesn't remotely qualify for sovereign immunity.

MTA argues, in essence, that the following cases *Federal Maritime Commission v. South Carolina State Port Authority*, 535 U.S. __, 122 S. Ct. 1864 (2002); *Alabama State Docks Terminal Ry. v. Lyles*, 797 So. 2d 432 (2001); *Abdulwali v. Washington Metro Area Transit*, 315 F.3d 302 (D.C. Cir. 2003); and, *Morris v. Washington Metro-Area Transit*, 315 F.3d 302 (D.C. Cir. 2003) signal a change in the century's

old analysis of a sovereign under the Eleventh Amendment. But in all of these cases, the issue of whether the entity was the alter-ego of the State entitled to sovereign immunity was conceded. None of them challenged or even criticized the standards set forth by this Court's Decisions in *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994); and, *Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628 (1988), *aff'd on other grounds*, 495 U.S. 299, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (1990).

Using these standards the MTA's constitutional status as an instrumentality of the State of New York, is even less tenable than that of New York City's two other interstate commuter railroads, New Jersey Transit and Port Authority Trans Hudson who both failed to qualify for sovereign immunity a decade ago in *Fitchik v. New Jersey Transit Rail Operation*, 873 F.2d 655 (3d Cir. 1989) (en banc) and Hess, supra. In Briefs presented to the Second Circuit on Motion, MTA concedes that it is a fiscally autonomous state instrumentality receiving only 3.71% of its income from State of New York subsidies. The direct taxes MTA cites are from the regions it services not from the State Treasury. The impact of any potential judgment against MTA will have no effect whatsoever on the Treasury of the State of New York. The State of New York is by statute not responsible for the debt and obligation of the MTA. Section 1269 Public Authorities law.

MTA has created a number of arms to protect itself and allow it to be fiscally autonomous:

1) It has its own captive insurance company, First Mutual Transportation Assurance Company for property and primary liability insurance;

2) "ELF", an excess loss trust fund to provide coverage for catastrophic losses;

3) MTA's special assistance fund to cover operating losses to any of its subsidiary transportation operations.

4) MTA has the power to issue debt through revenue bonds, excess loss trust fund bonds, NYCTA Transit Facility Revenue bonds, TBTA general purpose revenue bonds, TBTA Mortgage recording tax bonds and beneficial interest certificates;

5) MTA has complete control over its budget, case management and investments. It has the power to raise rates and increase operating funds;

6) MTA reports that it generates two-thirds of its 1.9 billion capital budget and is targeting being totally self-sufficient in the near future.

The MTA is governed by a 17 member Board of Directors of which only 5 are selected by the Governor of the State of New York. The other 12 are selected by other entities, including 3 from the Mayor of New York City and one from each of the following counties served by MTA: Dutchess,

Westchester, Rockland, Nassau and Orange; one from Transport Worker's Union; one from the permanent citizens committee; one from Long Island Commuter Committee; one from Metro-North Commuter Committee. Because of its diversity it is clearly not a board dominated by State Government.

Finally, the State does not have veto power over the lawful exercise of MTA's powers. Section 1263 N.Y. Public Authorities Law.

After considering the relevant facts and the applicable law, the Second Circuit denied MTA's Motion to Dismiss for lack of Jurisdiction under the Eleventh Amendment and for the reasons set forth should not be disturbed by this Court.

## CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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